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No. 97-387

In the Supreme Court of the United States

OCTOBER TERM, 1997

SCHUYLKILL ENERGY RESOURCES, INC.,
Petitioner,
v.
PENNSYLVANIA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly ruled that petitioner was unable properly to allege antitrust injury given the absence of any existing relevant market in which to measure the effects of the alleged anticompetitive conduct about which petitioner complains.

2. Whether the court of appeals properly concluded that, given the absence of any existing relevant market, further amendment of petitioner's amended complaint would be futile.

STATEMENT UNDER RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, respondent Pennsylvania Power & Light Company (now known as PP&L, Inc.) states that its parent company is PP&L Resources, Inc. and that it has the following nonwholly owned subsidiary: Safe Harbor Water Power Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. The Parties' Contract	2
B. Proceedings in the District Court	3
C. The Court of Appeals' Decision	5
ARGUMENT	8
I. THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY REJECTED SER'S ATTEMPT TO ASSERT ANTITRUST CLAIMS GIVEN THE ABSENCE OF ANY EXISTING RELEVANT MARKET IN WHICH TO MEASURE THE EFFECTS OF THE ALLEGED ANTICOMPETITIVE CONDUCT	8
II. THE COURT OF APPEALS CORRECTLY HELD THAT ANY ATTEMPT BY SER TO AMEND FURTHER ITS AMENDED COMPLAINT WOULD BE FUTILE	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES — Page

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 15
Austin v. Blue Cross and Blue Shield of Alabama, 903 F.2d 1385 (11th Cir. 1990) 9, 15
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 5
Bubar v. Ampco Foods, Inc., 752 F.2d 445 (9th Cir. 1985) 14
Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 15
Catlin v. Washington Energy Co., 791 F.2d 1343 (9th Cir. 1986) 15
Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 10
Drs. Steuer and Latham, P.A. v. National Medical Enters., 672 F. Supp. 1489 (D.S.C. 1987), *aff'd*, 846 F.2d 70 (4th Cir. 1988) 10
Florida Seed Co. v. Monsanto Co., 915 F. Supp. 1167 (M.D. Ala. 1995), *aff'd*, 105 F.3d 1372 (11th Cir. 1997) 14, 16
Great Western Directories, Inc. v. Southwestern Bell Tel. Co., 74 F.3d 613 (5th Cir.), *cert. dismissed*, 117 S. Ct. 26 (1996) 14
Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988) 4, 16
Miklavic v. USAir Inc., 21 F.3d 551 (3d Cir. 1994) 16
Pennsylvania Power & Light Company, Dkt. No. ER97-3055-000, 80 FERC ¶ 61,053, 1997 WL 564530 (July 17, 1997) 12
Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993) 10
Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369 (9th Cir. 1989) 10
Vinci v. Waste Management, Inc., 80 F.3d 1372 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1252 (1997) 15

TABLE OF AUTHORITIES—Continued

	Page
Walker Process Equip., Inc. v. Food Machinery & Chem. Corp., 382 U.S. 172 (1965)	10
RULES AND STATUTES	
66 Pa. C.S.A. § 2801 *et seq.*	7
66 Pa. C.S.A. § 2802(21)	11
66 Pa. C.S.A. § 2804(6)	11
66 Pa. C.S.A. § 2805	11
66 Pa. C.S.A. § 2806(b)(3)	7, 13
15 U.S.C. § 2	3
16 U.S.C. § 824a-3	4
OTHER AUTHORITY	
Kahn, "Surprises of Airline Deregulation," 78 *Am. Econ. Rev.* 316 (1988)	13
Kleit, "Computer Reservations Systems: Competition Misunderstood," 37 *Antitrust Bull.* 833 (1992)	13
U.S. Department of Transportation, "Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems," *Secretary's Task Force on Competition in the U.S. Domestic Airline Industry* (Feb. 1990)	12-13

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Schuylkill Energy Resources, Inc. ("SER"), asks this Court to grant certiorari to review SER's meritless antitrust claims. It does so despite the fact that both lower courts fully considered and properly rejected the effort of a high-priced supplier, SER, to transform its contract-based claims into federal antitrust claims. SER has conceded its inability to compete with respondent, Pennsylvania Power & Light Company ("PP&L"), in the existing, regulated retail market. SER, therefore, bases its challenge to the decisions of the courts below on its allegations about harm to SER as PP&L's potential competitor in the hypothesized future, deregulated market. As

recognized by the court of appeals, however, SER is unable to properly define a relevant existing market in which to measure the effects of the alleged anticompetitive conduct about which SER complains. PP&L respectfully submits that the petition for a writ of certiorari should be denied.

A. The Parties' Contract

On October 17, 1986, PP&L and SER entered into a Power Purchase Agreement under which SER agreed to sell all of its electrical energy exclusively to PP&L and PP&L agreed to purchase all of SER's net electric energy up to 79.5 megawatts for a period of twenty years. Amended Complaint ("Am. Compl."), ¶¶ 20 and 22; Pet. App. 5a, 17a, 28a.

Pursuant to the parties' contract, PP&L is permitted to purchase less than SER's total electric energy output when curtailed purchases are necessary for PP&L "to make repairs, changes, tests or inspections, or for reasons of an actual or potential system Emergency, Forced Outage, Force Majeure or PP&L System operating condition which necessitates such disconnections or curtailments." Am. Compl., ¶ 31 (quoting Agreement, Art. 9.E). A "system emergency" is defined under the contract as "any condition on the PP&L System or PJM System which, in PP&L's opinion, may disrupt service to customers or endanger life or property." Am. Compl., ¶ 32 (quoting Agreement, Art. 1.CC).[1] Article 9.F of the Agreement provides that the manner in which SER is required to operate its facility is set forth in Exhibits B and C to the

[1] As noted by the court below, "PP&L is a member of the Pennsylvania-New Jersey-Maryland Interconnection ('PJM'), a power pool maintained [at all relevant times] by an unincorporated association of approximately eight member utilities located in Pennsylvania, New Jersey, Maryland, Delaware and Washington, D.C." Pet. App. 4a-5a.

Agreement. It states that "[i]n the event of any inconsistencies or conflicts between Exhibits B and C and the terms hereof, the terms and conditions of Exhibits B and C shall take precedence over the terms and conditions of this Agreement." Article III of Exhibit B permits PP&L, at its sole discretion, to curtail purchases from SER in the event of minimum generation conditions on the PJM system (*i.e.*, when PJM generation exceeds PJM load).

During the first four and a half years of the parties' contract, PP&L curtailed purchases from SER due to system emergencies on numerous occasions without complaint from SER. Am. Compl., ¶¶ 47-48. From mid-1994 to mid-1995, due to increased minimum generation conditions on the PJM system, PP&L had to curtail its own generation, as well as its power purchases from qualifying facilities such as SER, more frequently than it had in the past. Am. Compl., ¶¶ 45-49.

B. Proceedings in the District Court

On August 7, 1995, SER filed this lawsuit in the United States District Court for the Eastern District of Pennsylvania. The complaint alleged that PP&L's conduct under the parties' contract constituted monopolization or attempted monopolization, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. SER also asserted related state-law claims for breach of contract, breach of duty of good faith and fair dealing, and negligent and intentional misrepresentation. The primary thrust of SER's complaint was that PP&L had breached the contract by curtailing purchases from SER, a high cost supplier, during minimum generation conditions for reason of "economic dispatch." Am. Compl., ¶¶ 40 and 42 (quoting Agreement, Art. 9.E). However, SER sought to fashion an antitrust claim out of an alleged breach of the contract imposed on PP&L by a federal law designed to *insulate* SER from competition.[2]

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[2] PP&L was required to enter into this contract pursuant to Section 210 of the Public Utility Regulatory Practices Act of 1978

PP&L moved to dismiss, arguing, *inter alia,* that SER had failed to allege a cognizable antitrust injury and that SER improperly sought to transform the parties' contract dispute into a federal antitrust action. SER then amended its complaint, and PP&L again moved to dismiss, because SER's amendments did not cure the substantive deficiencies in the original complaint, including the failure properly to allege antitrust injury.

At oral argument on PP&L's motion, the district court directed SER to file a supplemental letter brief identifying any factual issues raised by SER's antitrust claims. SER thereafter filed three such supplemental letter briefs, the first and third of which SER has reproduced in the appendix to the petition. Pet. App. 59a-76a, 98a-103a.

After full consideration, the district court dismissed SER's federal antitrust claims with prejudice for failing to allege cognizable antitrust injury. The court declined to exercise supplemental jurisdiction over SER's related state-law claims and therefore dismissed those claims without prejudice. Pet. App. 27a-40a.[3] The court provided a three-part explanation for its holding regarding the lack of a proper allegation of antitrust injury.

First, with respect to SER's claims of lost electricity sales revenues, increased operating costs, and accelerated depreciation, the court ruled that "[s]uch injuries to an individual competitor company, without allegations of in-

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("PURPA"), 92 Stat. 3144, as amended, 16 U.S.C. § 824a-3. Contrary to SER's assertions, the Third Circuit properly recognized that "[i]n establishing PURPA, . . . Congress did not intend to place qualifying facilities in competition with public utilities. . . . Qualifying facilities are not authorized under PURPA to sell at retail. . . . They are not competitors of public utilities." Pet. App. 15a n. 10 (quoting *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1373 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988)).

[3] SER shortly thereafter refiled its state law claims in Pennsylvania state court, which claims remain pending.

jury to competition or consumer welfare, are insufficient as a matter of law to establish a violation of federal antitrust law." Pet. App. 33a (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)).

Turning to SER's claims that PP&L's curtailment of energy purchases from SER and other independent power producers somehow harmed competition, the court observed that, as a regulated electric utility, "PP&L has no unilateral ability to change its rates; any increase or decrease must be filed with the PUC [*i.e.*, the Pennsylvania Public Utility Commission] and conform to PUC regulations or orders." Pet. App. 34a. In addition, the court said, although SER's allegations about "the reliability and environmental qualities of energy sources may be worthwhile concerns, they are not within the scope of federal antitrust laws." *Id.*

Finally, in response to SER's assertions that, by curtailing power purchases from SER, PP&L might enable itself in the future to obtain rate base increases that ultimately would operate to consumers' detriment, the court stated that "this allegation of speculative future antitrust injury, especially in the context of a highly regulated industry, is insufficient to survive PP&L's motion to dismiss." Pet. App. 37a.[4]

C. The Court of Appeals' Decision

The court of appeals affirmed. Pet. App. 1a-26a. The court agreed with the district court that the question of

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[4] In a footnote, the district court remarked that "SER's own allegations could be construed as demonstrating that PP&L's actions are actually procompetitive: SER alleges that it is PP&L's policy to 'curtail[] purchases of electric energy *first* from independent power producers [such as SER] to whom PP&L must pay the highest price for electricity.' (Am. Compl. ¶ 40). As a matter [of] basic economic theory, the loss of a higher price supplier would not tend to chill competition or raise prices to consumers; instead, it would seem likely to produce the opposite effect." Pet. App. 35a n. 7 (emphasis by the court).

"whether and to what extent PP&L maintains an artificially high rate base is not within the purview of the antitrust laws." Pet. App. 11a. Like the district court, the court of appeals stressed that "Pennsylvania regulators—not the market—determine PP&L's rate base. PP&L has no unilateral ability to change its rates; any increase or decrease in rates must be filed with the PUC and conform to PUC regulations and orders." *Id.* Similarly, the court rejected the notion that an alleged diminution in the availability of alternative energy sources or environmentally sensitive energy sources could constitute antitrust injury. Pet. App. 12a & n.9.

The court of appeals then ruled that, even if SER's complaint were construed to allege a reduction in competition in the provision of retail energy to consumers, it still would not assert any cognizable antitrust claim. The court emphasized that, in evaluating any antitrust claim, it is essential to "consider the scope of the relevant market." Pet. App. 13a. At present, the court observed, as far as providing retail service to consumers in eastern Pennsylvania is concerned, "SER is not PP&L's competitor—it is PP&L's supplier. . . . Pursuant to the Agreement which SER now seeks to enforce, SER is currently prohibited from competing with PP&L in the relevant market." Pet. App. 14a.[5] Accordingly, the court concluded, if SER is seeking to allege an injury in connection with the provision of retail electric service, it necessarily would involve the imposition of some sort of obstacle to SER's ability to compete with PP&L in a "future market," after deregulation. Pet. App. 16a. The court ruled that it could not "permit SER to pursue such a speculative path to recovery under the Sherman Act." *Id.*

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[5] The court of appeals noted SER's concessions that it "normally cannot, by virtue of state and federal regulation and physical limitations, sell power directly to consumers" (Pet. App. 15a, citing Am. Compl., ¶ 12) and that "SER did not, at the time the complaint was drafted, have the ability to deliver environmentally friendly energy directly to retail consumers" (Pet. App. 15a, citing Oral Arg. Trans. at 5).

During the pendency of SER's appeal, SER advised the court of the December 3, 1996 enactment of the Pennsylvania Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S.A. § 2801 *et seq.* SER sought to use the new statute as a means of breathing new life into its antitrust claims. The court of appeals observed, however, that under the statute "[c]ompetitive retail access will be phased in over time, and direct access to competition will not exist across Pennsylvania until January 1, 2001." Pet. App. 16a. *See also* 66 Pa. C.S.A. § 2806(b)(3). Stressing the uncertain contours of whatever future retail market(s) may exist after deregulation, the court declared that "[w]e do not know whether SER or PP&L will even exist in 2001, and we certainly do not know whether PP&L will enjoy an unlawful monopoly in its service area at that time." *Id.* The court noted the concession of SER's counsel during oral argument that "it's true that we don't know exactly what the market will look like [following deregulation]. . . ." Pet. App. 16a n.12. Because SER currently is not permitted to compete with PP&L in retail sales of electricity and because any future relevant market for such sales cannot be defined in the abstract, in advance of actual deregulation and the inevitable (but unknown and unknowable) economic changes it will bring, the court of appeals sustained the district court's ruling that SER did not and could not adequately plead antitrust injury.[6]

The court of appeals also addressed SER's contention that the district court abused its discretion in refusing to permit SER to make further amendments to the amended complaint. Pet. App. 21a-24a. After considering the potential amendments mentioned in two footnotes of one of SER's supplemental letter briefs, the court concluded

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[6] In a portion of the court of appeals' opinion that SER does not challenge in this Court, the court also rejected SER's contention that PP&L's alleged anticompetitive conduct somehow injured SER as a competitor of PP&L in the wholesale distribution of electric energy. Pet. App. 17a-19a.

that "SER's proposed amendments will not enable [SER] to withstand a renewed motion to dismiss, and we will not grant SER leave to amend further its Amended Complaint." Pet. App. 23a-24a. The court based its ruling on the facts that SER is not currently free to compete with PP&L,[7] and any future deregulated retail market does not currently exist and therefore cannot serve as the basis for evaluating SER's antitrust claims, no matter how many times the complaint is amended.[8]

ARGUMENT

I. THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY REJECTED SER'S ATTEMPT TO ASSERT ANTITRUST CLAIMS GIVEN THE ABSENCE OF ANY EXISTING RELEVANT MARKET WITHIN WHICH TO MEASURE THE EFFECTS OF THE ALLEGED ANTICOMPETITIVE CONDUCT.

The court of appeals correctly concluded that SER did not assert any cognizable antitrust injury in an existing relevant market, and further review is not warranted. SER does not argue that the Third Circuit failed to follow or apply properly any established precedent from this Court. Nor does SER contend that there is a split among the circuits on any relevant legal standard. Instead, given the total absence of any precedent to support its position, SER argues that this matter is a "case of first impression" and that this Court should "seize this moment to define the indicia of actionable antitrust injury during a transition from regulated to free markets." Pet. 17. However, SER's argument wholly ignores the elementary antitrust

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[7] Even SER concedes that its proposed amendment was designed to characterize retail competition as "imminent" (Pet. 7), not existing.

[8] Given its conclusion that any amendment would be futile, the court did not need to reach the separate issue of whether SER's two belated footnotes should have been construed as a motion for leave to amend. Pet. App. 24a n. 18.

principle that any allegation of antitrust injury must be assessed in the context of a properly defined market.

SER alleged below that PP&L's curtailment of energy purchases from SER and other independent power producers caused antitrust injury "by keeping PP&L's rate base artificially high, by depriving consumers within PP&L's service area of energy sources other than those owned and/or exploited by PP&L (which, in turn, reduces the reliability of electric service provided), and by reducing the availability to consumers of power produced using alternative, environmentally pro-active energy sources." Pet. App. 9a (quoting Am. Compl., ¶ 66). The court of appeals (Pet. App. 11a-12a) and the district court (Pet. App. 34a-38a) properly applied established principles of law concerning antitrust injury and found these allegations did not constitute antitrust injury. SER does not argue that this Court should review this aspect of the Third Circuit's ruling.

Instead, SER challenges the court of appeals' holding that SER's antitrust injury claim in the context of the future deregulated market is too speculative. Pet. 15-17. In this regard, the Third Circuit stated:

> SER asks us to find that PP&L's generation curtailment policy injures SER today, and that those injuries will inhibit SER's ability to compete with PP&L in the future market. We cannot permit SER to pursue such a speculative path to recovery under the Sherman Act.

Pet. App. 16a. In holding that SER's allegations of antitrust injury in the future, deregulated market are too speculative, the Third Circuit affirmed the district court's finding that SER's "allegation of speculative future antitrust injury, especially in the context of a highly regulated industry, is insufficient to survive PP&L's motion to dismiss." Pet. App. 37a (citing *Austin v. Blue Cross and Blue Shield of Alabama*, 903 F.2d 1385, 1392 (11th Cir. 1990)).

SER asks this Court to grant certiorari in this case so that this Court may define the elements of antitrust injury in the context of an emerging and as-yet nonexistent deregulated market. Pet. 11. This Court should decline the invitation. The court of appeals properly rejected SER's effort to assert claims of antitrust injury in the context of the future deregulated market, the "outline" of which even SER concedes has only "begun to develop." Pet. 16. A properly defined relevant market is the framework within which the competitive impact of any alleged anticompetitive conduct must be assessed and is a requisite element of a cause of action under Section 2 of the Sherman Act because "[w]ithout a definition of that market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 177 (1965). This Court recently emphasized the importance of defining the relevant market in which the alleged conduct would have an anticompetitive effect, and the defendant's market share in that market, in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). In that case, this Court rejected the Ninth Circuit's ruling that it was not necessary to define the relevant market and the defendant's market share in that market in an attempt to monopolize action. *Id.* at 459-60.[9]

In this case, SER claims that PP&L's curtailment of electric power purchases from SER during minimum generation conditions potentially will have some anticompetitive effect in an unknown and unknowable market at

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[9] *See also Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n. 21 (1977) (". . . an antitrust policy divorced from market considerations would lack any objective benchmarks."); *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1373 (9th Cir. 1989) ("defining the relevant market is indispensable to a monopolization claim"); and *Drs. Steuer and Latham, P.A. v. National Medical Enters.*, 672 F. Supp. 1489, 1510 (D.S.C. 1987) ("Market power cannot be assessed in a vacuum. Instead, the existence of a properly defined antitrust market is a prerequisite to determining the existence of market power."), *aff'd*, 846 F.2d 70 (4th Cir. 1988).

some time in the future. However, determining this potential anticompetitive effect will depend on numerous factors that cannot be accurately assessed at this time, including but not limited to the following: PP&L's market share in the future market; the identity and market share of PP&L's competitors in the future deregulated market; the nature and effect of any barriers to entry after deregulation; [10] the definition of the product market; the geographic area within which PP&L and its competitors will compete given the elimination of regulated service territories; [11] and the nature and extent of barriers to expansion, if any, in that market.

Perhaps most important of these factors, SER's analysis is based on the false assumption that PP&L will have monopoly power in a relevant geographic market after deregulation occurs.[12] That assumption is entirely speculative, if not plainly false, given the fact that numerous other electric power companies, including some substantially larger than PP&L, are lining up to compete with PP&L.[13] Given the economic opportunity presented by

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[10] SER itself expressly recognizes that one of the objectives of deregulation is to *remove* barriers to market entry. Pet. 9.

[11] In fact, the Pennsylvania Competition Act encourages the development of "competition" and "industry restructuring on a *regional* basis." *See* 66 Pa. C.S.A. § 2805 (emphasis added). *See also* 66 Pa. C.S.A. § 2802(21) (anticipating "competition among electricity generators located in different states and different regions within this Commonwealth").

[12] SER improperly seeks to mix and match various elements of the current regulated market (*e.g.*, PP&L as a regulated monopolist in its service territory) with potential aspects of the future deregulated market (*e.g.*, SER as a potential competitor) to create the appearance of cognizable antitrust injury. Under the Pennsylvania Competition Act, any electric generation supplier will be able to transmit and distribute electric power into PP&L's service territory over PP&L's facilities. *See* 66 Pa. C.S.A. § 2804(6).

[13] In addition to PP&L, more than forty companies to date have filed applications with the Pennsylvania PUC to become competitive electric suppliers, brokers, or aggregators in a service area encom-

this new market and the high degree of interest in entering that market that has already been manifested, quick and effective new competition entering PP&L's traditional service territory is likely. The full nature and extent of competition within future deregulated markets cannot now be accurately assessed. Indeed, even the likely product and geographic boundaries of such future markets cannot be known or reliably predicted. This point is confirmed by the experience in other restructured industries, such as airlines, in which the new patterns of competition were not apparent at the time of initial restructuring.[14]

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passing all of Pennsylvania: Affiliated Power Purchases; Allegheny Electric Cooperative, Inc.; Allegheny Energy Solutions, Inc.; American Energy Solutions; Cinergy Resources, Inc.; CNG Energy Services Corporation; CNG Retail Services Corporation (Peoples Plus); Competitive Utility Services Corporation; Conectiv Energy (a division of Delmarva Power); DTE-CoEnergy; Duke Trading and Marketing, L.L.C.; DuPont Power Marketing, Inc.; e prime, inc.; Eastern Power Distribution, Inc.; Energis Resources Incorporated; Engelhard Power Marketing, Inc.; Enron Power Marketing, Inc.; Equitable Power Services Company; GPU Advanced Resources, Inc.; Horizon Energy Company; mc2, Inc.; Mid American Natural Resources, Inc.; MidCon Gas Services Corp.; Nev East, LLC (New Energy Ventures-Mid Atlantic); NorAm Energy Management, Inc.; PacifiCorp Power Marketing, Inc.; PECO Energy Company; Pennsylvania Power Company; QST Energy, Inc.; Service, Technology and Resources Corporation (STARcorp Int'l); Southern Energy Retail Trading & Marketing, Inc.; Strategic Energy Partners Ltd. (Strategic Energy Ltd.); UGI Power Supply, Inc.; Virginia Electric & Power Company d/b/a Evantage; West Penn Power Company (Allegheny Power); Wheeled Electric Power Company and Cinergy Services, Inc.; Woodruff Oil Company d/b/a Woodruff Energy; and ENERGY, Inc. Many of these companies are located within the PJM interconnection system, a geographic market in which the Federal Energy Regulatory Commission has found PP&L lacks market power. *Pennsylvania Power & Light Company*, Dkt. No. ER97-3055-000, 80 FERC ¶ 61,053, 1997 WL 564530 (July 17, 1997).

[14] Only after airline deregulation did such new important aspects of competition such as hub-and-spoke systems, frequent flyer programs, and computerized reservations systems develop. *See, e.g.*, U.S. Department of Transportation, "Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reserva-

The Third Circuit's analysis properly recognized that the Pennsylvania Competition Act does not provide for direct access to competition across Pennsylvania until January 1, 2001. *See* Pet. App. 16a and 66 Pa. C.S.A. § 2806(b)(3). It correctly observed that "[w]e do not know whether SER or PP&L will even exist in 2001, and we certainly do not know whether PP&L will enjoy an unlawful monopoly in its service area at that time." Pet. App. 16a. Emphasizing that SER's own counsel had conceded that "it's true that we don't know exactly what the market will look like [following deregulation]," the Third Circuit concluded that it "cannot permit SER to pursue such a speculative path to recovery under the Sherman Act." Pet. App. 16a & n.12.

Without a properly defined relevant market, the analysis of the elements of antitrust injury in the emerging deregulated market hypothesized by SER in this case would have no context and would have little, if any, precedential value. Indeed, any pronouncement as to what would constitute antitrust injury in a market that is four years from existence would necessarily be vague, to put the point mildly.[15]

SER attempts to create the appearance of precedential support for its antitrust claims as a "potential competitor"

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tion Systems," *Secretary's Task Force on Competition in the U.S. Domestic Airline Industry* (Feb. 1990); Kahn, "Surprises of Airline Deregulation," 78 *Am. Econ. Rev.* 316 (1988); and Kleit, "Computer Reservations Systems: Competition Misunderstood," 37 *Antitrust Bull.* 833 (1992).

[15] The limited utility of any pronouncement here would be diminished further by the fact that each state attempting to deregulate its electric power industry is likely to do so in a different manner. SER notes in footnote 2 of its Petition that, as of mid-1997, eleven of the fifty states were actively implementing electric industry deregulation as directed by statute or regulatory initiative, more than 20 state legislatures were considering bills that could provide retail electric market competition, and nine other states had introduced deregulation study bills.

by asserting that "[v]arious federal courts throughout the country, in non-regulated market contexts, have long recognized that 'potential competitors' may employ the antitrust laws to fend off anticompetitive conduct engaged in by monopolies." Pet. 12. But those cases involve *existing* markets and in no way support SER's effort to assert a cognizable antitrust injury in a hypothesized future, deregulated market. Indeed, the cases cited by SER confirm that, even in the context of an existing market, a potential competitor faces a significant hurdle to establish that its claims of antitrust injury are not too speculative or remote. *See Great Western Directories, Inc. v. Southwestern Bell Tel. Co.*, 74 F.3d 613, 614 (5th Cir.) (plaintiff's claims of future antitrust violations were too speculative to support a damage award), *cert. dismissed*, 117 S. Ct. 26 (1996),[16] *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 452-54 (9th Cir. 1985) (plaintiffs lacked standing because they were not prepared to enter the market and become a viable competitor); and *Florida Seed Co. v. Monsanto Co.*, 915 F. Supp. 1167, 1176 (M.D. Ala. 1995) (distributor, who was barred by contract from entering manufacturing market, lacked standing to bring an antitrust action), *aff'd*, 105 F.3d 1372, 1374 (11th Cir. 1997) ("[T]he doctrine of antitrust standing reflects prudential concerns and is designed to avoid burdening the courts with speculative or remote claims.").[17]

Therefore, even the cases cited by SER in the context of existing markets confirm that the analysis of a potential competitor's ability to assert cognizable antitrust injury must reflect prudential concerns about speculative or re-

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[16] SER cited the 1995 decision of a panel of the Fifth Circuit in the *Great Western* case, but did not advise this Court of the subsequent 1996 *en banc* decision of the Fifth Circuit (which itself was subsequently vacated pursuant to settlement).

[17] Although SER cited the district court's 1995 decision in the *Florida Seed* case, it did not advise this Court of the Eleventh Circuit's subsequent 1997 decision.

mote allegations.[18] That concern is raised to a different level altogether—one that was properly recognized by the court of appeals to be dispositive—when the claim is based on the speculative possibility of antitrust injury to a potential future competitor in a future deregulated market, the contours of which are unknown and in which SER and/or PP&L may not exist, PP&L most likely will not be a monopolist, barriers to entry most likely will not exist, and the geographic market most likely will expand far beyond the bounds of PP&L's current regulated service territory.

For all of the foregoing reasons, SER may not assert a viable antitrust cause of action based on the alleged anticompetitive effect of PP&L's conduct in the future, deregulated market that is four years away. Moreover, even if it were theoretically possible for SER to state a cognizable antitrust claim in a future deregulated market, SER would be unable to do so in this case. As the court of appeals expressly ruled, "[p]ursuant to the Agreement which SER now seeks to enforce, SER is currently prohibited from competing with PP&L in the relevant market." Pet. App. 14a. In October 1986, SER entered into an agreement with PP&L under which SER is required to

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[18] *See also Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 545 (1983) (affirming the district court's dismissal of plaintiff's complaint due to "the tenuous and speculative character" of plaintiff's antitrust injury allegations); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117-19 (1986) (the record did not support a finding of antitrust injury where plaintiff alleged that, after the merger at issue, defendant could potentially attempt to drive plaintiff out of business with predatory pricing tactics); *Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1375 (9th Cir. 1996) (speculative allegations of injury are a factor to be considered in determining whether a plaintiff has antitrust standing), *cert. denied*, 117 S. Ct. 1252 (1997); *Austin*, 903 F.2d at 1392 (speculative allegations concerning antitrust injury can be the basis for finding no standing); and *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) ("The trier of fact must be able to ascertain causal antitrust injury 'without engaging in speculation.' ").

sell its electrical energy exclusively to PP&L for twenty years. Pet. App. 5a and 14a (citing Am. Compl., ¶¶ 20, 22).[19] Pursuant to this agreement, SER is prohibited from competing with PP&L for the sale of electricity until at least 2006. Thus, prohibitive contractual clauses bar SER's claims here.[20]

II. THE COURT OF APPEALS CORRECTLY HELD THAT ANY ATTEMPT BY SER TO AMEND FURTHER ITS AMENDED COMPLAINT WOULD BE FUTILE.

SER alternatively seeks an order summarily reversing the denial of SER's purported request for leave to amend further its amended complaint. Pet. 17-21. This contention is highly case-specific and in no way satisfies any of the criteria that might justify review by this Court. In any event, the requested relief is unwarranted here because the court of appeals properly determined that any further attempt to amend the amended complaint would be futile.

SER attempts to focus this Court on the district court's alleged failure to address the futility of amendment. Pet. i (*i.e.*, "where the District Court made no finding that amendment would be futile"). The court of appeals, however, expressly addressed the futility of amendment. The court of appeals gave SER the benefit of the doubt as to whether it raised the request for leave to amend in a timely and sufficient manner. Pet. App. 24a n. 18.[21]

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[19] As noted above (*see* footnote 2, *supra*), PP&L was required to enter into this contract under PURPA, a federal statute designed "to encourage the development of qualifying facilities by *insulating them from competition.*" *Greensboro Lumber*, 643 F. Supp. at 1373 (emphasis added).

[20] *See, e.g., Florida Seed*, 915 F. Supp. at 1176 (plaintiff lacked antitrust standing because prohibitive contractual clauses barred plaintiff from entering relevant market).

[21] The court of appeals emphasized that any review of the district court's failure to grant a motion for leave to amend would be performed under an abuse of discretion standard. App. 24a n. 18, citing *Miklavic v. USAir Inc.*, 21 F.3d 551, 553 (3d Cir. 1994).

The Third Circuit reviewed SER's proposed amendments and expressly concluded that those amendments would "not enable [SER] to withstand a renewed motion to dismiss." Pet. App. 23a.

Based on the rationale underlying its rejection of SER's arguments on the substantive antitrust claims, the court of appeals properly found that SER's proposed amendments would not cure the contractual and practical obstacles to SER's ability to state cognizable antitrust injury to SER as a potential competitor of PP&L in the future deregulated market.

The court of appeals, therefore, correctly determined that SER's proposed amendments would be futile. In view of that futility, the court properly held that SER should not be given leave to amend further its amended complaint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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